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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON
PORTLAND DIVISION

BOYAJIAN PRODUCTS, LLC,

Plaintiff,

v.

ENBY LLC,

Defendant.

Case No. 3:20-cv-01991-HZ

MEMORANDUM OF LAW ON BEHALF
OF 553 NON-BINARY (OR “ENBY”)
INDIVIDUALS AS AMICI CURIAE IN
SUPPORT OF DEFENDANT ENBY
LLC’S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Plaintiff Boyajian¹ seeks to stop Defendant Shop Enby from accurately describing itself as an online shop, run for and by people who are non-binary. That is, “enby” is simply the shortened, more casual way the community says “non-binary” (non-binary shortens to “N.B.”, which gets pronounced and rendered “enby”). And if one goes to shopenby.com, they will find just that: a shop, run by people who are enby, for people who are enby.

In seeking to monopolize this bit of language, Boyajian doesn’t even allege they use the word “enby” in the same way: their use describes a product, Shop Enby’s describes a store. And despite an alleged likelihood of confusion, Boyajian fails to allege that even a single consumer has been confused.

That is because they cannot. *Amici* are all themselves enby (or non-binary). They write because this suit troubles them: if Boyajian can monopolize and exclude the enby owners of Shop Enby from accurately stating “we are an enby shop,” what comes next? *Amici* and their community have fought long and hard to even *have* language to describe themselves. They ask this Court to provide them assurance that they will be able to continue to accurately describe themselves to the world, free from fear of legal consequences.

STATEMENT OF INTEREST

The 553 individual *amici* listed in the addendum to this brief are all non-binary – or, informally “enby” – people. They range in age from their teens to their

¹ Names and other terms are defined in the body of the brief below.

50s and hail from across the globe – from right here in Portland, to Japan, to Australia. *Amici* work in a wide variety of fields as well, ranging from the sex toy industry where this dispute arises to a wide variety of advanced fields requiring multiple degrees. In short, *amici* represent a wide-ranging snapshot of the experience of enby people across the world – and their perspective on the word “enby” reflects that.

As detailed throughout this brief, these enby *amici* have a profound interest in ensuring that words used to describe their identity are not monopolized and, essentially, taken out of use for the sake of private profit. That is, “words are not always fungible, and that the suppression of particular words runs a substantial risk of suppressing ideas in the process.” *S.F. Arts & Ath., Inc. v. United States Olympic Comm.*, 483 U.S. 522, 532 (1987) (cleaned up). Or, as **Florence Ashley**² (28, Jurist/Bioethicist) puts it:

Without language to speak to our identity and experiences, how can we know ourselves and make ourselves known to the world? Philosophers call this hermeneutical injustice: the injustice of being deprived of your ability to communicate knowledge. [...]

While ‘non-binary’ is great, it is also lengthy and an adjective meaning that if I want to describe myself using a noun, I have to go for ‘person’ which is great but fails to emphasize my gender in the way that ‘man’/‘woman’ does. ‘Enby’ is that word for me, helping me tell people my gender in a concise manner that rolls off the tongue. It’s an important part of my daily practices and makes me feel visible in a world that too often wishes I didn’t exist.”

Kel O’Hara (28, Attorney) explains, “Just as ‘man’ and ‘woman’ are easy words for

² *Amici* are indicated with bolding throughout this brief. Mx. Ashley is notable for also being the first openly transfeminine person to clerk for Canada’s Supreme Court.

gender identity that do not require the users to get into the intimate details of how they understand themselves and their gender, so is ‘enby’ for me.” That is, *amici*’s interest is in having a word that communicates who they are – and in commercial enterprises advertising themselves as open to *amici*.

Put simply, for *amici*, it is vital for enby-oriented business to answer the question “what are you?” with the clear, correct answer: an “Enby[-friendly] Store,” an “Enby[-owned] Store,” or any other manner of store that *exists for and is run by people who are enbies*. *Cf. Filipino Yellow Pages, Inc. v. Asian Journal Publ'ns, Inc.*, 198 F.3d 1143, 1151 (9th Cir. 1999) (“If faced with the question ‘What are you?’, FYP’s Filipino Yellow Pages, AJP’s Filipino Consumer Directory, and the Filipino Directory of the U.S.A. and Canada could all respond in the same way: ‘A Filipino yellow pages.’”). If Plaintiff’s claims proceed, *amici* will be chilled from giving the true, descriptive answers to everyday questions.

ARGUMENT

I. The Word “Enby” Describes the 553 Enby *Amici*, Just as it Describes the Product Plaintiff Sells.

As explained in Enby LLC’s brief, both of Enby LLC and Boyajian’s uses of the term “enby” are purely descriptive. Plaintiff Boyajian Products, LLC (“Boyajian”) claims they started making a sex toy they call the “Enby” rechargeable vibrator in the middle of 2019. ECF No. 1 ¶ 7. In the last decade, “enby” has entered common use in the queer – and in particular, in the transgender and non-binary – community, as a shortening of “non-binary” (non-binary shortens to “n.b.” which is pronounced “enby”). And as Boyajian explained, the name was intentional:

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“We wanted to … banish the binary by offering non-gendered products.” ECF No. 13-5 at 5. Enby LLC (“Shop Enby”) runs an online store at “shopenby.com.” They are, per their website, “a Black/Trans owned company run by 3 enby’s and believe that all bodies deserve affirmation and pleasure.” Hence the name and web address.

As explained below, for *amici*, the value of simply having language to describe themselves cannot be overstated. As **Kendra Albert** (31, Lawyer) notes, “even ‘limited’ claims to own an identity marker can significantly chill speech.” And that chill would touch on *amici*’s very identities and selves.

a. The history and importance of the word “enby”

The relationship between the non-binary community – or the queer community at large – and language is a complicated one. **J.M. Archer** (20, Freelance Writer & Dramaturge) explains, “We, queer folks, are charged with carving an identity out of the world whether we enjoy doing so or not. It’s extremely important that our lexicon is varied, consistent, and free, and that any word describing our experiences is available to be claimed or reclaimed by us.” For non-binary people like *amici* in particular, that process of carving out an identity may involve creating new terminology from whole cloth – in part, because much of our language begins by presuming sex and gender fall into two, neat categories.

It was this problem that **Vector Plasm** (or, “revolutionator” on Tumblr) (31,

Japanese-English Translator) set out to fix in coining “enby” online in 2013:³

When I first came up with the word it was because I was lamenting the lexical gap for children without gender. Men have boy. Women have girl. I thought enby would make a good replacement for children who were not gendered, being a cute smush of vocalizations of the letters N and B (for Non Binary). The word has been used in far more applications than I could ever have dreamed of back in 2013 when I thought it up and I think that is beautiful. Many adults tell me that it’s a word that speaks to them and defines them and I am happy for them even if that was not the original intent of the word. It is a word to give people language.

That playful spirit remains for many *amici*. **Eric Davies** (30, Software Developer) explains that “[i]t is a convenient short way to say ‘non-binary’ or ‘non-binary person [and i]t lends itself well to portmanteaus (e.g., ‘enbyfriend’ instead of ‘girlfriend’ or ‘boyfriend’). Or, as **A. Cody Kuhn** (25, TA/Graduate Student) puts it, “Enby has been a cute shorthand, one of the first words that felt more comfortable and less technical, more ‘right.’” **TJ Sheff** (29, Construction Safety Manager) similarly notes that, “[s]o much descriptive language for identity is super formal[.] Having a shorter, informal term like ‘enby’ to describe myself is super nice! The world’s a dark, serious place sometimes. My gender doesn’t have to be, though.” And for some *amici*, like **Darain Bemis** (23, Unemployed), the value of “enby” is as simple and mundane as the fact that “nonbinary takes a while to say and to type.”

Other *amici* emphasize that they need the word “enby” for their work, personal, and political lives. **Shelby Cragg** (28, Artist) explains, “I am an author writing a book with nonbinary main characters. My work would not be possible

³ See also, Jay Logan, *Queer Etymology: Enby*, MEDIUM (Dec. 16, 2019) (noting that a “September 2013 post, originally from Tumblr user revolutionator[] is the origin of the term [enby].”)

without this language!” Reflecting on this suit, **Dre Ceja** (24, Director of Training & Education) worries that this case might set “a very disturbing precedent[:] Will I be able to use the word ‘enby’ in my inclusion trainings? In my upcoming book? In my posters for transgender and non-binary support groups? In fundraisers for the lifesaving programs that my center provides?”

Speaking to the personal importance, **Ryn Daniels** (34, Site Reliability Engineer) notes that “[g]etting to try on different words and labels is an important part of the process of self-exploration for many people.” And turning that experience outward, **Aran Ink** (30, Software Engineer) says, “A lot of the trans experience involves forming connections with other trans people, learning what you do and don’t have in common, and sharing skills and insight into navigating through a world that frequently misunderstands and mistreats you. Having access to language that is both descriptive and convenient is crucial to helping this process happen.” As for the political, “non-binary people have always existed, but we didn’t have a social movement until we had language to describe ourselves,” observes **Tilde Thurium**, (36, Software Engineer).⁴

But the stakes here are not just playful, professional, or political. They can be life and death as well. **Kit Stubbs** (39, Founder & Exec. Director of a Non-

⁴ Cf. also, Megan Davidson, *Seeking Refuge Under the Umbrella: Inclusion, Exclusion and Organizing Within the Category Transgender*, 4 Sexuality Research & Social Policy 61, 62 (Dec. 2007) (discussing the history of the word “transgender,” and noting, “[f]or many, how they framed their own identity and embodiment in relation to this category was intimately tied to how they conceptualized the term *transgender* and, therefore, how they perceived this social movement and the gains for which it should fight.”).

Profit) recalls that “[h]aving language to describe my identity has been crucial to my mental well-being.” But, “[l]earning the terms ‘non-binary’ and ‘enby’ helped me name my own experiences, which was incredibly affirming! Having these terms also meant that I could use them to find other people who have had similar experiences. Once I started looking around for other non-binary folks, particularly online, I started feeling less lonely and isolated.” **Pippin Shaeffer** (24, Student) is more blunt: “I didn’t have the word[s] ‘nonbinary’ and ‘enby’ in my life until I was 19 ... Since then, I have seen a significant reduction in the severity of my major depressive disorder and in the frequency and severity of suicidal ideation.”⁵ As is **Dave Macdonald** (41, Accountant): “I went decades without language to describe how I am and it was harmful. I self-harmed, was at the risk of suicide, and was in relationships where my partners and parents couldn’t understand me.”

Beyond that, having just one word to describe one’s self is often not enough. **Eli Sander** (29, Data Scientist) explains, “It’s important to me to have many different words to describe my identity; every word has a different feeling, and is

⁵ See also, World Prof'l Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* 4-5; 9-10 (7th ed. 2012) (recognizing that living consistently with one’s gender identity significantly improves health outcomes among people who experience gender dysphoria, and noting that anxiety and depression “are socially induced and are not inherent” to transgender status); Lily Durwood et al., *Mental Health and Self-Worth in Socially Transitioned Transgender Youth*, 56(2) J. Am. Acad. Child & Adolescent Psychiatry 116, 120 (2017) (finding normal levels of depression in transgender children who had already socially transitioned as compared to a control group of non-transgender children, unlike previous studies’ findings of “markedly higher rates of anxiety and depression and lower self-worth” among “gender-nonconforming children who had not socially transitioned”).

appropriate in different situations. Think about how many words we have for a man – guy, dude, bro, boy, to name a few – those words let people express themselves more richly. I found having multiple words for non-binary identities to be especially helpful when I was coming to terms with my own identity, because it helped me understand and explore the diversity in the non-binary community and consider where I fit in.” More than that, as **Vic Wiener** (31, Lawyer) observes, enby “also serves an important linguistic role. It is grammatically incorrect to say, ‘I am a nonbinary.’ However, it is correct to say, ‘I am an enby!’ It is the term many of us use where others would typically say, ‘I am a man,’ or ‘I am a woman.’”

All told, being able to freely use the word “enby” – and to have it freely available even in commercial contexts – is of vital importance to *amici*. It is a useful, easy answer to the ever-present question of, “what are you?” *Amici* are “enby.” And the significance and meaning of the word “enby” come from the community, not from Boyajian. As **Magdalen Wulf** (24, Doula) notes, “We in the queer community have used this word to describe aspects of our identity for a long time now without ever hearing of this brand. They did not coin the term; they got it from us.”

Thus, **Marsel Dorais** (25, Tattoo Artist) offers this profound summary:

I believe language holds so much power. Language is molded by our values, by history, by culture. It is something that we are born into, and that we maybe feel like can never change, because it feels timeless and bigger than us. When actually, it is ever changing, as it is living. Every time we speak, it lives. Language can often be overlooked, underestimated, but our words holds our truths, and it is important that we get to chose the ways in which our truth(s) need to be held.

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b. The names of Boyajian's "Enby" toy and the Enby Store both simply answer the question, "What are you?"

The goal of trademark law is ultimately to ensure accurate consumer knowledge – and to protect the consumer. *See generally, What is a Trademark?, 1 McCarthy on Trademarks and Unfair Competition § 3:1 (5th ed.).* The law incentivizes sellers of goods to tell consumers what it is they are buying, so consumers can consistently find goods that they want – and correctly identify the source of those goods. So, the Lanham Act requires that any trademark protected against infringement be distinctive. That is, identifiable as originating from a particular source. 15 U.S.C. § 1052; *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992). Distinctiveness can either be inherent or acquired. 15 U.S.C. § 1052. And without distinctiveness, a mark receives no protections, except in rare cases when a descriptive mark acquires some secondary meaning (usually through extensive advertising or exclusive use over a long period of time⁶). 15 U.S.C. § 1052(f).

⁶ Common law protection in a particular region generally also requires some minimum of sales in that region. *Hanginout, Inc. v. Google, Inc.*, 54 F. Supp. 3d 1109, 1118 (S.D. Cal. 2014) (citing *Credit One Corp. v. Credit One Fin., Inc.*, 661 F. Supp. 2d 1134, 1138 (C.D. Cal. 2009) (“A party asserting common law rights must not only establish that it is the senior user, it must also show that it has ‘legally sufficient market penetration’ in a certain geographic market to establish those trademark rights.”)). Sporadic internet sales often cannot establish this base level of sales for common law protection. *Optimal Pets, Inc. v. Nutri-Vet, LLC*, 877 F. Supp. 2d 953, 962 (C.D. Cal. 2012) (finding no market penetration in any geographic location based on evidence of internet sales to 16 states totaling less than \$10,000 in one year); *Hanginout, Inc. v. Google, Inc.*, 54 F. Supp. 3d 1109, 1121-4 (S.D. Cal. 2014) (finding insufficient evidence for market penetration without evidence of registered users in the relevant market). Other courts have also suggested that the nature of the internet would require some level of allowance for concurrent online use by common law mark owners. *Dudley v. Healthsource Chiropractic, Inc.*, 883 F.

Common law trademark protection in Oregon similarly requires that the mark protected be distinctive or have acquired secondary meaning. *Ernst Hardware Co. v. Ernst Home Ctr., Inc.*, 895 P.2d 1363, 1365 (Or. Ct. App. 1995).

In evaluating whether a mark is generic or descriptive⁷ “and therefore not protected under trademark law,” the Ninth Circuit “favor[s] the ‘who-are-you / what-are-you’ test: A protectable mark answers the buyer’s questions ‘Who are you?’ ‘Where do you come from?’ ‘Who vouches for you?’ But the generic name of the product answers the question ‘What are you?’” *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 327 F. App’x 723, 723-24 (9th Cir. 2009) (cleaned up), *citing Filipino Yellow Pages*, 198 F.3d. at 1147. “Generic terms, describing ‘what’ a product is, do not enjoy trademark protection because they do not identify the source of a product.” *Swanson v. Instagram, LLC*, 716 F. App’x 743, 744 (9th Cir. 2018).

In the first instance, as the USPTO aptly concluded, the use of ENBY by Boyajian is descriptive because “[a] mark that describes an intended user or group of users of a product or service is merely descriptive.” ECF No. 13-2 at 42. But the term is also generic, because the name “Enby” does not describe “who vouches” for

Supp. 2d 377, 394–96 (W.D.N.Y. 2012). Plaintiff’s complaint fails to even attempt to plead over these hurdles with anything but unadorned legal conclusions.

⁷ As various courts have observed, “distinctions between generic and descriptive and descriptive and suggestive are often illusory.” *Fryer v. Brown*, No. C04-5481 FDB, 2005 U.S. Dist. LEXIS 20830, at *7 (W.D. Wash. July 15, 2005). And that may be for good reason. “In a sense, a generic designation is the ultimate in descriptiveness.” J. T. McCarthy, *Trademarks and Unfair Competition* § 12:5, at 538 (2d ed. 1984).

Boyajian's toy. Nor does it describe "where" or "who" the toy is or comes from.

Rather, as press coverage emphasizes, the name describes *what* the toy is: a sex toy designed for enby users. For example, coverage of Boyajian's toy in Allure even begins with a "question [the author] could not answer: 'Where are all the sex toys for transgender men?'" and explains that Boyajian's Enby answers that question because "the enby was designed to fit the needs of any genitals and gender, *thus the name.*" Jennings Exh. 2 (ECF No. 13-3) at 3-4 (emphasis added). *See also, e.g.,* Jennings, Exh. 3 (ECF No. 13-4) at 2 ("Ever thought a sex toy should work for everyone, regardless of gender? The founders of sex toy retailer [Boyajian] agree. The company's newest product, Enby, is the first gender-neutral sex toy on the market.").⁸

Indeed, a handful of *amici* even own the Enby toy (though they now have mixed feelings about the purchase) but make clear they do not understand the name to identify a source – but as a toy marketed to them because they were non-binary. Of those *amici*, **Monroe Standish** (20, Student) explains, "When I purchased it, I loved having an androgynous toy that was an extension of myself. But that is all it is... an extension. [Boyajian] do not own being Enby. They do not own me. They do not own my Identity, and I am appalled that they would try to."

⁸ To that point, apparently, in Boyajian's interviews with Ask Men magazine, they noted that "Enby was designed, and lovingly crafted after the minds at [Boyajian] who spent countless hours querying the LGBTQ community on their secret wishes and desires. Above all, it was important to them – and their broadening range of customers from all walks of life – that the Enby did not project an identity or sexual style upon the user." *Id.* at 4.

Yet, it is not as if *amici* all object to being marketed to. More broadly, because “[s]ex toy marketing tends to be heavily gendered,” **Stevannie Ross** (47, Copyeditor), “applaud[s] attempts at catering to the nonbinary market, but [makes clear that] common terms for members of our community shouldn’t be reserved for the exclusive use of one company.” Thus, **Florence Ashley** concludes, “Anyone told the term ‘enby,’ even in the context of sex toys, would think of non-binary people and of toys that are intended to benefit their diverse bodies without undue gendering.”

Ultimately, Boyajian’s claimed mark is generic in the same way set out in *Filipino Yellow Pages*. 198 F.3d 1143 (9th Cir. 1999). *Filipino Yellow Pages* concerned, as the name suggests, whether “combining the generic terms ‘Filipino’ and ‘yellow pages’ to form the composite term ‘Filipino Yellow Pages’ creates a generic or a descriptive term.” 198 F.3d at 1148. Here, Plaintiff does not even have *that* much: They have only combined “enby” with the word “the” (and placed it near the word vibrator in all their copy). So, just as “[t]he word ‘Filipino’ is a clearly generic term used to refer to ‘a native of the Philippine islands’ or ‘a citizen of the Republic of the Philippines’” (198 F.3d at 1147), the word “enby” is a generic term used to refer “to a person who does not identify their gender specifically as either a male or a female.” ECF No. 13-2 at 42 (USPTO report). An “enby [vibrator]” is a vibrator for enby people. *Cf. also, United States PTO v. Booking.com B.V.*, 140 S. Ct. 2298, 2309 (2020) (Breyer, J., dissenting) (“What is Booking.com? To answer this question, one need only consult the term itself.”).

II. If Plaintiff Has Any Mark, It Cannot Cover Defendant's Use of the Word Enby.

Amici's core interest in this case is in ensuring that the word enby – a word that describes who they are – is available for their use, without restriction. Thus, even if the Court finds Plaintiff has *some* rights in the word (it should not), the scope of those rights should be narrow. And, for the same reasons that *amici* should be allowed to use the word “enby” to describe themselves, Shop Enby’s non-binary owners’ use of “enby” should not violate even the hypothetical, weak rights Boyajian has.

As the Supreme Court recently explained in *Booking.com*, “[w]hen a mark incorporates generic or highly descriptive components, consumers are less likely to think that other uses of the common element emanate from the mark’s owner.”

United States PTO v. Booking.com B.V., 140 S. Ct. 2298, 2307 (2020). And more to the point, “even where some consumer confusion exists, the doctrine known as classic fair use protects from liability anyone who uses a descriptive term, fairly and in good faith and otherwise than as a mark, merely to describe her own goods.” *Id.* at 2307-08. That is, to prevail, Boyajian needs to have pled that Shop Enby’s use of the term “enby” is not only “to describe the goods or services of a party.” *New Kids on the Block v. News Am. Publ’g, Inc.*, 971 F.2d 302, 306 (9th Cir. 1992) (alteration adopted), *citing* 15 U.S.C. § 1115(b)(4). And they do not – and cannot. Shop Enby is – literally – a shop, run by and for people who are enbies. Hence, “shopenby.com.” It is, to be sure, not particularly clever. But that lack of cleverness is (at least in part) what places Shop Enby’s use beyond the strength of any mark Boyajian could

hypothetically obtain.⁹

For *amici*, this limitation on the strength of any putative mark – and the chill that would accompany any doubt on that limitation – is vital. Important here is the fact that Boyajian has labeled a particular *product* “enby,” while Shop Enby has used it to identify their entire business. That mismatch is important: with the weak reach of any potential mark, it is hard to see how any consumer would be confused. And beyond that, there are virtually identical uses of the word “enby” to Shop Enby’s. For example, ENBY Magazine has been publishing since 2016.¹⁰ Maybelline has sponsored an award show simply called “ENBY” in India (and subtitled, appropriately, “The Non-Binary Awards”) while a burlesque show in London is titled “The Enby Show,” to say nothing of the purely descriptive uses – outside naming things – that abound. So, any consumer confusion that Shop Enby is really owned by Boyajian is hard to imagine. As **Johann Koehle** (32, Researcher) notes, “It would be as if the publishers of Girl Magazine had sued the publishers of Brown Girl, American Girl, GirlsLife, It Girl, or Girl’s World. If you choose to name your product after a gender, you have to expect that someone else might have the same general idea.”

When confusion *might* emerge, however, would be in how people react to this

⁹ Thus, in *Booking.com*, the Supreme Court suggested that allowing Booking.com to register a mark for “Booking.com” would not cause any chill to vendors seeking to use marks like “ebooking.com” or “hotel-booking.com.” 140 S. Ct. at 2307. *See also, id.* at 2315 (Breyer, J., dissenting) (“Not to worry, the Court responds, infringement doctrines such as likelihood of confusion and fair use will restrict the scope of protection afforded to ‘generic.com’ marks”).

¹⁰ See “Issues,” ENBY MAGAZINE, available at <https://www.enbymag.ca/issues>.

suit being permitted to go forward. That is, the “threat of costly litigation will no doubt chill others from using variants on [‘Enby’].” 140 S. Ct. at 2315 (Breyer, J. dissenting). As **Sophia Pelecanos** (31, Law Student/Paralegal) explains, “[t]his term is extremely common in the community. It is how many people identify. To trademark it would be uncomfortable because people will continue to use it. It would be unfortunate for this to repeatedly appear in court rooms for violation of a trademark or lose our ability to use it.” **Lila Garrott-Wejksnora** (39, Writer) also fears the scope of chill, explaining, “this is a word my son’s preschool class uses. [Boyajian] would either fail to defend its trademark or wind up suing a lot of random people, including, I emphasize, my son’s actual preschool.” Or, as **Lena Fanya Aeschbach** (25, Scientific Assistant) puts it, “it is an entire gender of people that have been limited in their own expression. It doesn’t make sense to me how this can be possible.” And as **Djuna Delker** (23, Student) explains, “by trademarking [‘enby,’ Boyajian] will take away the opportunity for other trans people to grow projects with it. Non-binary people are more likely to be at financial risk due to hiring discrimination or being rejected by family and community. So it’s a downright evil move as a non-binary person to deny other non-binary people job and business opportunities like that.”

Thus, **Ryn Daniels** cautions, “even if the owners of [Boyajian] themselves identify as nonbinary, it is not a word that belongs *only* to them. Words like ‘enby’ belong to everyone, and you do not get to claim them for yourself and try to take them away from the community they belongs to.” Shop Enby, like *amici*

themselves, cannot – consistent with trademark law – be forbidden from correctly and accurately describing their shop as a shop for and by enbies. **Emma McClure** (31, Graduate Student) worries that, if the claims proceed, “it is an entire gender of people that have been limited in their own expression. It doesn’t make sense to me how this can be possible.” And **Elle Dietz** (29, Researcher) fears there is no stopping point: “If I use [‘enby’] to describe myself publicly in my own business, what’s to stop them from sending me a cease and desist on my own personhood? If they take this word, our identity, from us the non-binary community... then what do we have? Maybe we’ll make a new word, but then what’s to stop another company from coming and taking it away?”

CONCLUSION

In the end, it is of the deepest possible significance to *amici* that they be able to freely use the word “enby.” They, just like Defendant, need to describe themselves with the limited language available. One of *amici*, whose native language is not English and does not have ungendered pronouns (**Karolina Kubinova** (23, Customer Support Specialist)), notes that this absence of language “makes me extremely uncomfortable to the point where I would rather not talk about myself at all.” And that is the ultimate effect Plaintiff’s case would have: taking away limited language when, as **Brianna Rafidi** (25, State Manager) notes, “this community already has so few words to use for itself.”

For all the reasons above, then, *amici* urge the Court to grant the motion to

dismiss.

Dated: January 29, 2021
Brooklyn, New York

Respectfully Submitted,

/s/ J. Remy Green

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¹¹ Law student Sarah Marmon, who is not a member of the bar of any court, also helped prepare this brief.

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Midvale UT

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unemployed
Quebec, Canada

Marsel Dorais
Tattoo artist
Tio'tia:ke ("Montréal"), "Québec,"
"Canada"

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Graduate Student
Brunswick, Maine

Vern Harner
Doctoral candidate
Seattle, WA

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Operations Team Leader
South Jordan, UT, USA

Eli Sander
Data scientist
Chicago, IL

Johann Koehle
Researcher
Santa Barbara, California

Vic Wiener
Lawyer
Bixby, Oklahoma

Kara Nowakowski
Law Graduate
Ridgewood, New York

Kel O'Hara
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Josh Wright
Programmer
Houston, TX

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Instructional Designer
Chicago, IL

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Web & Graphic Designer
San Francisco, CA

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Hoboken, NJ

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California

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Atlanta, Georgia

Mer Francis

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San Diego, CA

Staver Klitgaard

After school art teacher and painter
Brooklyn, New York

Lara Tobin

Social Worker
Roscoe, NY

Jason Seawright

Professor
Evanston, IL

Nael Sideralis

Paralegal/student
White Lake, MI

Scott Maddix

Theater Management and Production
Salt Lake City, Utah

Bridget Lawson

Law Fellow
Washington DC

Sunny Maxwell

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Salem, Oregon

Ki Gurholt

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South Salt Lake, UT

Miranda Riddle

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Los Angeles, CA

Echo Gregor

Web Engineer
Brooklyn, NY

Greyson Simon

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Seattle, WA

Krissy Avise-Rouse

Clergy
Columbia, Illinois

Caine Rees

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Benjamin Schaffer

Software engineer and bus driver
Passaic, NJ

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Japanese-English Translator
Huntsville, Alabama

A. Cody Kuhn

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Student
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A Seebach

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Baker
Brooklyn, New York

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student
Argentina

Rue Lineback

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Greensboro, North Carolina

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Digital Content Creator
NJ

Doss Stone

Coffee shop
St Louis MO

Chloe O'Hara

Library Page
Wisconsin

Darian Bemis

unemployed
Pima

Shelby Cragg

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california

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Bloomington, Indiana

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MEMORANDUM ON LAW ON BEHALF OF AMICI CURIAE
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Page 21

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MEMORANDUM ON LAW ON BEHALF OF AMICI CURIAE
IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

Page 22

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¹ *Amici*'s names with initials have been kept anonymized at their request, for various reasons, including that they might not be "out" to the public or that they fear violence because of their transgender status (and fear being readily identifiable on a public list of this kind).

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Dre Ceja
Director of Training & Education
Harrisburg, PA

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Elizabeth Green
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Jazmin Lemus
Unemployed
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Aibhne Paton
Not applicable
Scotland

Katrina Poharama
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Shay Dax
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England

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Kathryn Dahel

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Nova Scotia, Canada

Aneidys Reyes

Stay at home parent
Madison, Wisconsin

Anton Carlsson

Student
Sweden

Danyell Davis

case manager for queer law firm
New Orleans, LA

Karolina Kubinova

customer support specialist
Prague, Czech Republic

Parker Morgan
Administrative Assistant
Wacissa, Florida

Kit MacNeil
Adjunct Professor
Buffaly, NY

Kat Merks
Hairstylist
Montreal, Canada

Charlie Jones
student
Poughkeepsie, NY

Tyler Cronan
Delivery Driver
Worcester, MA, USA

Danielle Reveld
Contact Tracer
NYC

Jessica Charlton
Director of Animal Shelter
Seattle, WA

Paresseux Caudle
pet sitter
Alabama

Nikita Matfin
System Administrator
Newcastle, UK

Taylor Norris
Library circulation/book shelver
Tennessee

Cameron Staub
Student
Carmichael, California, USA

Kelly Miklas
MA student and research assistant
Columbia, MO

Mackenzie Maher
Wawa overnight clerk
Ocean County, New Jersey

Heather-Lynne Van Wilde
Legal Journalist
Portland, Oregon

Nadya Mariam
Student
Wisconsin

Ingrid Thurow
Trails manager
Portland, Oregon

Amy Muniz
Disabled
Ellenville, New York

Autumn Ricketts
Unemployed
Watsonville, California

Shimon'ah Shushan
Theatre Designer
San Diego, Ca

Caroline Dall
Hair Dresser
Portland, OR

Nikita Szylo
Programmer
Czerwona Niwa, Poland (before the
pandemic: Warsaw, Poland)

El Evans
Social worker (Harm reduction counselor)
Brooklyn, NY

Xander Heckman
Student
Newburyport, MA

Joy Yukumoto
Student, Retail Worker
Kāne'ohe, Hawai'i

Zoya Sarow
Program Coordinator
Denver, Colorado

Lindsey Mechuta
Student
Virginia

Catherine Hamilton
Sales Clerk
Missoula Montana

Michaela Jones
Film Production Coordinator
Ontario, Canada

Sez Morales
Food Pantry Coordinator
South Hadley, Massachusetts

August Cason
Resource coordinator
Baltimore, Maryland

leti soriano
Student
New Orleans, LA

Josiah Valle Ellis
Artist
Brooklyn, NY

Aspen Carter
Kennel Technician
Denton, TX USA

Andrew Sacher
Software Engineering Manager
San Francisco, CA

Sam Calvetti
Public Health Research Assistant
Los Angeles, CA

Shannon Tilley
Student
Laguna Niguel, CA

Echo Vieira
Public Health
Canada

Arie Van Antwerp
Software Engineer
San Francisco, CA, USA

Dakota McCallister
Student
San Antonio, Texas

Camden Gouveia
Student
Acton, MA

Mone Wallin
Medical student
Sweden

Kaylee Novakovski
Student
Canada, Calgary

Nikki Vazquez
Teacher
USA

Saskia Lara Neupert
Unemployed Artist
Berkeley, California

Elizabeth King
Teacher
Baltimore MD

Nyk/Kiki Laurence
Barber
Brooklyn, New York

Hager Hassanein
Server
San Francisco

River Walker
Unemployed
New York City

Sy Bedrick
Apprentice Jeweler
Providence, RI

Alex Phelps
Mental Health Specialist
Nashville, TN

Cal Lynes
Disabled
Vermont

Anni Jefferson
Student
Canada

Molly Gould
Behavioral Technician
Mendon, Massachusetts

Ariel Acevedo
Artist
Massachusetts

Sydney Anderson
Receptionist
Chicago, Illinois

Kate Stevens
Student
Penticton, BC, Canada

Kelsey Koch
Graphic Designer
New York, NY

Mika D'Angelo
Law student
Monmouth Junction, New Jersey

Daniel Splitter
Self-employed Online Resale
Olympia, Washington

Mary Elise Elam
Technical Director
Vancouver, BC, Canada

Laiba Qureshi
Student
Aarhus, Denmark

Lauren Mack
Actor & Teacher
Brooklyn, NY

Linden Moore
Unemployed
Providence, Rhode Island

Elias Ponhold
Student
Austria

Sky Simon
Rental Assistance Specialist
Boston, Massachusetts

Chase Gilley

Digital Marketing Specialist, Umpqua Community College
Roseburg, OR.

Frances Metzger

Hotel Front Desk
Big Sky, MT

Mel Nyx

Test Engineer
Brooklyn, NY

Micky Reynolds

Student
Ottawa, Ontario, Canada

Katherine Dever

Student
AK

Mars Rembolt

Food Packager/Student
San Diego, California

Julie Wills

Unemployed
Canby, OR

Ruth Wejksnora-Garrott

psychologist
Cambridge, MA

Valyrie Autumn

Student
Houston, Texas

Jamie Emmott

Student
Edinburgh, Scotland, UK

Quenby Harley

Admin Worker and Part-time Artist
UK

Sara Bellusci

Unemployed
South Pasadena, CA

Xadie Antonio

Musician/artist/performing artist
Denver, Colorado

Damien Fox

Freelance Illustrator
Aiken SC

Heather Griffith

Bus and paratransit operator
Missoula, Montana

Elle Dietz

Researcher
Sacramento, California

Parker Ellis

Retail Associate
Raleigh, North Carolina

Melody Rainpod

Student
Russia

Katie Loop

Equity and Diversity Program Specialist
Saint Paul, MN

Sam Miller

Volunteer Coordinator
Los Angeles, California, USA

Oleander R.

Student
Georgia

Jay Scott

Retail Associate
Bellingham, WA

Stacey Spectacular
Sex Worker
New Orleans, LA

Jenna Messer
Admissions counselor
Columbus, Ohio

Luca Forcino
Student
Brooklyn

Aria Stewart
Computer Programmer
Salem, MA

Maachi Naakamutunii
Residential Advocate at shelter
Confederate Tribes of the Grand
Ronde land Portland, OR

Aza Olsrud
Disability
norway

Jacqalin Keeling
Disabled
NY

Deborah Ridenour
Social Worker
Lake Orion Michigan

Meg Chaperon
Unemployed
Chicago, IL

D. Bouchard
Social Worker
Burlington, VT

Annyston Pennington
Graduate Student
Virginia

Lee Tausch
Student
Overland Park, Kansas

Lark McManus
Disabled
Scotland

Katherine McFarlin
Student
Houston, TX

Max Pizzardi
Research and Evaluation Analyst
New York, NY

Anlee Manaloto
Billing Clerk
Astoria, NY

Zoo Holmstrom
Social media manager
Los Angeles, CA

Em Kitchens
Student
Charleston South Carolina

Grayson Greening
Immigration paralegal assistant
Denver, CO

Ilsa Dohner
Student
Syracuse, NY

Tobi DiSalvo
Unemployed/Artist
Delaware

Julia Moquin
Set Decorator
Los Angeles, California

Jane-Victorius Bonsaksen
Student
Norway

Bailey Pfeifer
Therapist
Chicago, IL

Belacqua Behnke
Graduate Student
Lincoln Park, MI

Kevin Sem
Student
Orway

Gabriella Davidson
Unemployed
Tacoma, Washington

Arleigh Hitchcock
Wetlands Ecologist
Fairbanks, AK

Wren Cooke
Stage Manager
Baltimore, Maryland

Camille Paquette
Cook
Montreal, Canada

Ash Trull
Software Engineer
Lakeville, MA

Beckie Moriello
Lawyer
Durham, NC

Charlotte Sullivan
Support worker
London, UK

Andrew Rich
Doula, Lactation Professional
LaGrange, Kentucky

Jenna Brown
Doula
Austin TX

Kate York
Birth Worker, Lactation Counselor
Ypsilanti, MI

Jeremy Bowen
Full-Spectrum Doula
Seattle, Washington

Michele James-Parham
Midwife & Sex Education Instructor
Pittsburgh, Pennsylvania

Julia Quandt
library assistant
California

Magdalen Wulf
Doula
Baltimore, Maryland

Kimberly Powell
Teacher, Tutor, Business Owner
New York City, NY

Cory Bush
Doula
Brooklyn, NY

cat crow
Disabled Student
Hurst, Texas

Neil Girling
Engineering Director
Oakland, California

Dani Rodriguez
Environmental Aide
Chatham, NJ

Matthew Bischoff
CEO
New York, NY

Hannah Kane
Librarian
West Bend, WI

Terry Caber
Art Director
Hamburg, NY

Sam Herett
Unemployed
London, England

Frankie Black
Unemployed
Demorest, GA

Emrys Travis
Student
UK

Hayley Henebury
Disabled/Unemployed
Rhode Island

Laine Altman
Student
Modesto, CA, USA

Rebekah Jackson
Legal Assistant
Florida

Michele Keller
Software Developer
Austin, TX

Josie Breck
Librarian/Artist
Baltimore, MD

Zoe Province
Customer Care
Springfield, IL

Siobhan Vega
Production Assistant
New York, NY

Veronuca Red
Data Scientist
Washington, DC

Alex Taylor
Student Nurse
United Kingdom

Chris Thayer
Research Associate/Data Scientist
Atlanta, GA, USA

Mariana Poole
Adjunct professor
Graham, North Carolina

Kimberly Rhoten
PhD Candidate
Somerville, MA

Quinn Dunham
Unemployed
New York, NY

Shane Hicks
Author and Artist
North Carolina

Marina Martinez-Bateman
CEO
Portland, Oregon

Abigail Jans
Homemaker
Woodway, Tx, USA

AJ Luxton
Writer
Portland, Oregon

Ian Estes
Deli Clerk
Portland, Oregon

J. L. Baldridge
Disabled Homemaker
Tacoma, WA

Andra (Amanda) Atkins
Educational Technology
Imlay City, MI

Alex Conall
disabled
Tacoma WA

Jiz Lee
*Actor and Author Working in the
Fields of Gender and Sexuality*
Oakland, CA USA

Nicole DeLeon
Manager
Fort Myers, FL

Alex Byrne
Librarian
Tacoma, WA

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IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS